1-1-1999

Nonjudicial Punishment: What's in a Name? Nonjudicial Punishment Under the Double Jeopardy Microscope

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NONJUDICIAL[1] PUNISHMENT: WHAT'S IN A NAME? NONJUDICIAL PUNISHMENT UNDER THE DOUBLE JEOPARDY MICROSCOPE

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INTRODUCTION

"The list is long, but distinguished."[2] This quote is a comedic retort in the military action movie, *Top Gun.* The movie came out thirteen years ago and was very popular, in fact, almost every teenage boy I knew wanted to be a pilot after they saw it. It was a very "feel good" movie about the military and it almost certainly helped recruiting. Today, the military could use another such "feel good" movie. Recruiting and retention are hurting and the armed services are already spread thin throughout the globe. Furthermore, the nation's view of the military has been tainted by various news stories. The list is long and anything but distinguished. The last few years have produced some awful stories: adultery, sexual misconduct in basic training, shoot-downs of our own helicopters, and airplanes clipping ski gondolas. All of these stories weave a common thread—they have put the military justice system in the public eye.

Arguably, no single facet of the military has had more attention than its justice system. The justice system is seen by many to be archaic and not in touch with society.[3] Typically, the defense of the so-called archaic and out-of-touch system, is that the military is different and needs to maintain good order and discipline in order to achieve the highest state of readiness and

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[1] In this paper, the author has purposely used "nonjudicial punishment" as opposed to "non-judicial punishment." The latter is how it is denominated in the governing statute, 10 U.S.C. § 815 (1994), however, the former is how it is denominated in the Manual for Courts-Martial (1998) and the applicable service regulations. For consistency, the author uses the former

[2] TOP GUN (Paramount Pictures 1986).

[3] *See generally* David A. Schlueter, *Military Justice in the 1990s: A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991).

traditionally, this justification has received a high amount of deference from our nation's courts.[4] One process of the military justice system is grounded in this principle of maintaining good order and discipline more than any other—Nonjudicial Punishment. Nonjudicial Punishment is a Congressionally authorized[5] military disciplinary measure more serious than administrative corrective action, and as the name implies, less serious than a trial by court martial.[6] It is used by commanders to impose swift corrective action upon military members for minor offenses. Although nonjudicial punishment has not been in the limelight specifically, it has been the subject of a three recent court cases—one in a federal district court,[7] one in a military appeals court[8] and one in a state supreme court.[9]

Coincidentally, these cases dealt with nonjudicial punishment in a double jeopardy context, and perhaps, not surprisingly some of the cases somewhat struggled with the issue. Although each court was dealing with different double jeopardy issues, each issue is important, albeit for different reasons. This paper sorts through these issues of nonjudicial punishment. Section I outlines nonjudicial punishment—its role in the military justice system, its history, the statute and implementing regulations, the legislative history behind its enactment, and its process and procedures. Section II provides an overview of double jeopardy, highlighting: recent relevant United States Supreme Court decisions, state statutory extension of double jeopardy, and double jeopardy in the military system. Section III sets out the facts, analysis, and holdings for the *Gammons, Ivie,* and *Burns* decisions. Section IV synthesizes these decisions, acknowledging

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[4] *See* Chappell v. Wallace, 462 U.S. 296, 300-05 (1983) (need for military discipline makes 42 U.S.C. § 1983 action against superior officers improper).
[5] *See* 10 U.S.C. § 815 (1994).
[6] MCM, Part V, para. 1b.
[7] *See* United States v. Burns, 29 F. Supp.2d 318 (E.D. Va. 1998).
[8] *See* United States v. Gammons, 48 M.J. 762 (C.G. Ct. Crim. App. 1998).
[9] *See* Washington v. Ivie, 961 P.2d 941 (Wash. 1998).

strengths and weaknesses, and then incorporates these strengths and weaknesses into a proposed analysis of nonjudicial punishment in a double jeopardy context. Section V discusses the potential impact of the recent holdings and makes recommendations to alleviate this impact. Finally, the paper concludes that nonjudicial punishment does not invoke double jeopardy protection.

I. NONJUDICIAL PUNISHMENT

A. Military Justice Overview

Before discussing nonjudicial punishment in detail, it is important to understand how nonjudicial punishment fits into the scheme of military justice. Accordingly, a brief background on military justice is provided here. Included is a discussion of the sources of authority for the military justice system and a discussion of the various responses commanders may employ to deal with servicemember misconduct.

Military justice is governed by four sources: the Constitution, statutory law, executive order, and departmental regulations. Under the Constitution, Congress is granted general authority "[t]o make Rules for the Government and Regulation of the land and naval Forces[.]"[10] Congress has exercised this authority by enacting the Uniform Code of Military Justice ("UCMJ").[11] The UCMJ authorizes the President to make rules for administration of military justice.[12] The President has done this by issuing The Manual for Courts-Martial ("MCM").[13] Finally, the

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[10] U.S. CONST. art. I, § 9, cl. 14.

[11] Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108.

[12] 10 U.S.C. § 836 (1994). This statute authorizes the President to make rules and procedures governing pretrial, trial, post-trial, and evidence for military courts-martial or other military tribunals. *See id.*

[13] Exec. Order No. 12473 (1984), *reprinted in* Manual for Courts-Martial, app. 25, at I (1998).

various armed services are, in certain instances, authorized, under both the UCMJ and the MCM, to establish regulations for situations which may be peculiar to their respective service.[14]

The military justice system created by all of these sources is, in some respects, not very different than the civilian system of law. In the military system, just as in the civilian system, offenses range from very minor to very serious.[15] The type of accused varies from the consistent offender to the one-time offender.[16] Accordingly, as in the civilian system, "military law provides graduated responses to the offense committed."[17] In all, there are generally five levels of response to military misconduct: administrative action,[18] nonjudicial punishment,[19] summary court-martial, special court-martial, and general court martial.[20] The first level of response is described in the MCM, which states "administrative actions include corrective measures such as counseling, admonition, reprimand, . . . or the administrative withholding of privileges."[21] The next level of response is denoted "more serious than administrative [action] . . ., but less serious than trial by court-martial."[22] It is a means by which commanders can maintain good order and discipline in a prompt fashion without stigmatizing service members with a conviction.[23] Finally, the last three levels of response, the various courts-martial, are trials of an accused. A case can be sent to court-martial for a variety of reasons. For example, the accused can refuse

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[14] *See, e.g.*, 10 U.S.C. § 815(a), (c) (1994); MCM, R.C.M. 106 (1998).
[15] *See* EDWARD M. BYRNE, MILITARY LAW 15 (1981).
[16] *See id.*
[17] *Id.*
[18] *See* MCM, R.C.M. 306(c)(2) (1998).
[19] *See* 10 U.S.C. § 815 (1994); MCM, Part V (1998).
[20] *See* 10 U.S.C. § 816 (1994); MCM, R.C.M. 401 (1998).
[21] MCM, R.C.M. 306(c)(2) (1998). *See also id.* Part V, para. 1g (discussing relationship between nonjudicial punishment and administrative action).
[22] *Id.* Part V, para. 1b.
[23] *See id.* Part V, para. 1c.

nonjudicial punishment and demand a court-martial, if that right is available.[24] Additionally, the commander may simply decide that it is more appropriate, due to the nature of the offense, to send it to a court-martial. The different levels of courts-martial vary as to composition, jurisdiction, allowable punishments, procedural rights, and finally, as to who can convene them.[25]

B. History of Nonjudicial Punishment

With a sense of where nonjudicial punishment fits in the military justice hierarchy it is now appropriate to examine its origins. Nonjudicial punishment in its current form was enacted in 1962.[26] However, the theory is centuries old, dating back to the time of Ancient Athens, where Athenians acknowledged that military commanders could punish summarily.[27] In this country, the roots of nonjudicial punishment can be traced back to the Revolutionary War. The American colonies recognized the need for naval commanders to deal with misconduct in an informal way and thus granted those commanders the authority to punish without a court-martial.[28] However, the Army was not given similar authority. Despite prodding by General Washington, the Continental Congress refused to grant this type of authority to Army commanders.[29] This prompted the development of general orders providing for summary punishment.[30] The first Congressionally approved enactment of nonjudicial punishment for the Army was not passed until 1916,[31] and with various changes, this statute stood until the enactment of the Uniform Code of *Military* Justice in 1950, which provided one-hundred and forty articles for the

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[24] *See* 10 U.S.C. § 815(a) (1994) (stating that a service member "who is attached or embarked in a vessel" does not have the right to demand trial by court-martial); *see also* MCM, Part V, para. 3 (1998).
[25] *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (4th ed. 1996).
[26] Act of Sept. 7, 1962, Pub. L. No. 87-648, § 1, 76 Stat. 447.
[27] *See* BYRNE, *supra* note 15, at 192.
[28] *See id.* at 193.
[29] *See id.*
[30] *See id.*
[31] *See id.*

government of military justice of all armed services.[32] Article 15 of the UCMJ was the article authorizing nonjudicial punishment.[33] By 1962, Article 15 was criticized as inadequate in dealing with the needs of the commanders in the field and, as such, was significantly revamped.[34] Today, Article 15, with minor non-substantive amendments, exists as enacted in 1962.

C. Nonjudicial Punishment - The Law

1. *Statutory Language*

The statute governing nonjudicial punishment is Article 15 of the UCMJ, codified at 10 U.S.C. § 815. The statute sets out the general authority for commanding officers to use nonjudicial punishment. Specifically, it specifies who may impose punishment, who may be punished, what offenses may be punished, procedural rights of an accused, the types and limits of punishment, and what further action, if any, may be taken by the officer imposing punishment. Furthermore, the statute specifies that the President and Secretary of the service concerned may prescribe additional regulations limiting the kind and amount of punishments, limiting the types of officers who may impose punishment, and outlining rules with respect to the suspension of punishments. The President exercised this authority by promulgating Part V of the MCM.[35] Similarly, each service secretary has issued governing regulations.[36] The next few paragraphs

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[32] Act of May 5, 1950, ch. 169, § 1, 64 Stat. 112.
[33] *See* 10 U.S.C. § 815 (1994).
[34] *See* S. REP. NO. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2379.
[35] *See* MCM, Part V (1998).
[36] The relevant regulations are: Air Force Instruction 51-202 (1996) [hereinafter AFI 51-202]; Army Regulation 27-10, para. 3.0 (1996) [hereinafter AR 27-10]; The Manual for the Judge Advocate General, Part B (1990) (Navy-Marine Corps publication) [hereinafter JAGMAN]; Military Justice Manual, Part 1 (Coast Guard publication) [hereinafter MJM].

will expand on the specifics of nonjudicial punishment, incorporating guidance from the statute and the regulations.[37]

a. Who and What Is Punished by Whom?

The statute authorizes a commanding officer to impose certain punishments for minor offenses upon both officers and enlisted personnel under his command.[38] Additionally, the statute authorizes the Secretary of the service concerned to give nonjudicial punishment authority to an officer in charge of a unit over the enlisted members of assigned to that unit.[39] The term "minor offense" is undefined in the statute, but the MCM provides that "[n]on-judicial punishment may be imposed for acts or omissions minor offenses under the punitive articles" of the UCMJ.[40] "Whether an offense is minor depends on several factors[.]"[41] The MCM explains that "[o]rdinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than a year if tried by general court-martial."[42] Furthermore, the MCM provides that it is completely within the commander's discretion to determine whether an offense is minor.[43]

b. Procedural Rights

The only right guaranteed in the statute, is the right to demand trial by court-martial in lieu of nonjudicial punishment; and even this right does not apply to those who are "attached to or

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[37] For an excellent and up-to-date discussion of the statute and all regulations see SCHLUETER, *supra* note 25, at Chapter 3.

[38] *See* 10 U.S.C. § 815(b) (1994).

[39] *See id.* § 815(c). Only the Navy, Marine Corps and Coast Guard have exercised this authority. *See* SCHLUETER, *supra* note 25, at 116 n.5 (citing JAGMAN 0106b; MJM 1-A-2.a).

[40] MCM, Part V, para. 1e (1998). The punitive articles are codified at 10 U.S.C. §§ 877-934 (1994) and are set out and explained in Part IV of the MCM.

[41] MCM, Part V, para. 1e (1998). The MCM states that the factors include: "the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial." *Id.*

[42] *Id.*

embarked on a vessel."[44] The MCM provides additional procedural rights. The servicemember shall receive notice that includes: "(1) a statement . . . that authority is considering . . . punishment; (2) a statement describing the alleged offenses; (3) a brief summary of the information on which allegations are based"[45] or statement that evidence may, upon request, be examined; (4) a statement of right to appear personally;[46] and (5) statement of right to demand trial by court-martial if applicable.[47] Furthermore, after punishment is imposed, the servicemember has the right to appeal if they consider their "punishment unjust or disproportionate."[48]

c. Procedure

The statute does not specifically spell out the procedural details. The MCM, supplemented by the service regulations, fills in the gaps. Besides the notice and hearing requirements discussed above, the MCM specifies that, with the exception of privileges, the Military Rules of Evidence are not applicable.[49] The MCM also outlines the nonjudicial punishment authority's options as to a decision.[50] The MCM is silent as to the standard of proof however, the service regulations do provide guidance. The Air Force regulation states that "[w]hile no specific

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[43] *See id.*

[44] 10 U.S.C. § 815(a). For an in-depth discussion of the "vessel exception," see Major Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57 (1996) (discussing history and original understanding of the "vessel exception", arguing that the "vessel exception" is not being used as intended, and proposing a reform for the "vessel exception").

[45] MCM, Part V, para. 4a(1)-(2) (1998).

[46] *See id.* para. 4c. This paragraph provides that ordinarily a servicemember has a right to appear personally. If they do appear personally, they are entitled to: be informed of their rights; be accompanied by a spokesperson; be informed of the information and how it relates to charges alleged; examine documents or objects that authority may rely on; present matters in defense, mitigation, or extenuation; have present witnesses; have proceeding open to public. *See id.*

[47] *See id.* para. 4a(3)-(5).

[48] 10 U.S.C. § 815(e) (1994); MCM, Part V, para. 7 (1998).

[49] *See* MCM, Part V, para. 4c(3) (1998) ("[a]ny relevant matter may be considered").

[50] *See id.* para. 4c(4). After considering all relevant matters, authority may terminate the proceedings or conclude that one or more of the offenses was committed. *See id.*

standard of proof applies . . . the commander should recognize . . . offender is entitled to demand trial . . ., in which case proof beyond a reasonable doubt by competent evidence is prerequisite . . . . If such proof is lacking, action under Article 15 is usually not warranted."[51] However, the Navy-Marine Corps Manual provides that since nonjudicial punishment is simply a disciplinary proceeding, "the standard of proof . . . is a preponderance of the evidence."[52]

d. Punishment

The bulk of the statute outlines the type and the limits on punishment.[53] The statute specifies four types of penalties for officers: restriction to limits, arrest in quarters, forfeiture of pay, and detention of pay.[54] Additionally, the statute specifies seven punishments for enlisted personnel: confinement on bread and water or diminished rations, correctional custody, forfeiture of pay, reduction in grade, extra duties, restriction to limits, and detention of pay.[55] The MCM restates

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[51] AFI 51-202, para. 3.3.

[52] JAGMAN 0110b. The paragraph provides in total:

> b. Standard of proof. Captain's mast/office hours that results in nonjudicial (sic) punishment is not a criminal trial; it is a disciplinary proceeding. Its purpose is to determine whether an offense was committed by the member and, if appropriate, to provide punishment therefor. Such punishment is designed for minor misconduct in a nonjudicial forum, without the permanent stigma of a record of "Federal conviction." As such, the standard of proof by which facts must be established at mast or office hours is a "preponderance of the evidence," rather than a reasonable doubt.

Id. The term "office hours" is Marine Corps moniker for nonjudicial punishment, whereas "captain's mast" is the term used by the Navy and the Coast Guard. The Army and Air Force simply refer to nonjudicial punishment as "Article 15." *See* SCHLUETER, *supra* note 25, at 114.

[53] *See* 10 U.S.C. § 815(b) (1994).

[54] *See id.* § 815(b)(1). Unless the commander is "an officer exercising general court-martial authority or an officer of general or flag rank in command," the commander is limited to the punishment of restriction to limits for not more than thirty days. *Id.* Otherwise the limits are: arrest in quarters for 30 days, forfeiture of not more than one-half of one month's pay per month for two months, restriction for 60 days, and detention of not more than one-half of one month's pay per month for three months. *Id.*

[55] *See id.* § 815(b)(2). Confinement on bread and water is only authorized for "a person attached to or embarked in a vessel." *Id.* § 815(b)(2)(A). Unless the commander is in or above the grade of major or lieutenant commander (O-4), the punishments are limited to: correctional custody for not more than seven consecutive days, forfeiture of not more than seven days' pay, reduction to the next inferior grade, provided commander had authority to promote to the grade from which removed, extra duties or restriction for not more than fourteen consecutive days, and detention of pay for not more than fourteen days' pay. *Id.* § 815(b)(2)(B)-(G). Otherwise the limits are: thirty consecutive days for correctional custody; forfeiture of not more than one-half one month's pay for two months; reduction in grade to the lowest or any intermediate grade, provided commander had authority to promote to the

these punishments without limitation, except that detention of pay is not an authorized punishment, because it was seldom used and was too hard to manage.[56] The applicable service regulations place additional limitations on the impositions of punishment, especially in the area of reduction in grade.[57]

e. Post-Punishment Action

Once punishment is imposed the commander has many options. The commander may suspend the punishment, postpone its application for a specified period, with the understanding that it will be remitted if there is no further misconduct.[58] The commander may also mitigate the punishment, by reducing its quantity or quality.[59] Another option the commander has is to remit or vacate a punishment whereby any portion of the unexecuted punishment is cancelled.[60] Finally, the commander may set aside the punishment, restoring the offender to the position held before the punishment.[61]

A clear understanding of the statutory and regulatory law of nonjudicial punishment is only half the background necessary to guide nonjudicial punishment through a double jeopardy analysis, the other half is the legislative history. A discussion of which follows.

2. *Legislative History*

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grade from which removed, provided further that anyone above an E-4 may only be reduced two pay grades; extra duties for not more than forty-five consecutive days; and restriction for not more than sixty days.

[56] *See* MCM, Part V, para. 5; *id.* app. 24, para. 5.

[57] *See* AFI 51-202, Table 1; AR 27-10, para. 3.19 & Table 3-1; JAGMAN 0111. Additionally, the Air Force recommends that forfeiture of pay or reduction in grade only be imposed without suspension in the cases where maximum exercise of nonjudicial punishment is warranted. *See* AFI 51-202, para. 5.4.2.

[58] *See* 10 U.S.C. § 815(d) (1994); MCM, Part V, para. 6a (1998); *see also* AFI 51-202, para. 8.3; AR 27-10, para. 3.24; JAGMAN 0118.

[59] *See* 10 U.S.C. § 815(d) (1994); MCM, Part V, para. 6b (1998); *see also* AFI 51-202, para. 8.4; AR 27-10, para. 3.26; JAGMAN 0118.

[60] *See* 10 U.S.C. § 815(d) (1994); MCM, Part V, para. 6c (1998); *see also* AFI 51-202, para. 8.5; AR 27-10, para. 3.27; JAGMAN 0118.

[61] *See* 10 U.S.C. § 815(d) (1994); MCM, Part V, para. 6d (1998); *see also* AFI 51-202, para. 8.6; AR 27-10, para. 3.28; JAGMAN 0118.

As will be shown, legislative intent is a key factor in the relevant double jeopardy analysis, therefore, the legislative history behind the enactment of nonjudicial punishment is summarized here. As was mentioned above, nonjudicial punishment was enacted as part of the UCMJ in 1950[62] and subsequently underwent substantive revision in 1962.[63] It is the history behind these two congressional acts that is of primary concern here.

In 1949, the Senate Armed Services Committee, in reporting the bill[64] that would become the Uniform Code of Military Justice, stated that the purpose of enacting nonjudicial punishment was to "enable[] commanders to impose limited punishments for disciplinary purposes."[65] The Senate Armed Services Committee reported that Article 15 is a combination of "mast punishment of the Navy and Coast Guard and the disciplinary punishment imposed by commanding officers in the Army and Air Force."[66] In describing the punishment, the committee stated "[it] consists of withholding of privileges, restriction to specified limits, forfeiture of limited amounts of pay, and is not imposed pursuant to trial by court-martial."[67] The committee recognized that the Army and Air Force had never used confinement or confinement on bread and water as disciplinary tools, but noted it was tradition in the Navy. Despite its disdain for such harsh punishment, Congress acquiesced and permitted the Navy to continue with these types of punishments but only "upon persons attached to or embarked in a vessel."[68]

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[62] Act of May 5, 1950, ch. 169, § 1, 64 Stat. 112 (current version at 10 U.S.C. § 815 (1994)).
[63] Act of Sept. 7, 1962, Pub. L. No. 87-648, § 1, 76 Stat. 447.
[64] H.R. 4080, 81st Cong. (1949).
[65] S. REP. NO. 81-486 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2227.
[66] *Id.* at 2226.
[67] *Id.* at 2226-27.
[68] *Id.* at 2234.

In 1962, Congress passed a bill,[69] its sole purpose being to increase the authority of military commanders to impose nonjudicial punishment.[70] In reporting on the bill, the Senate Armed Services Committee noted the nonjudicial nature of Article 15 punishment by stating it "provides a means [for] commanders [to] deal with minor infractions of discipline without resorting to the criminal law processes."[71] Furthermore, the Committee noted that because the punishment is nonjudicial, "it is not considered as a conviction of a crime and in this sense has no connection with the military court-martial system."[72] The Committee added "[i]t has been acknowledged over a long period of time that military commanders should have the authority to impose nonjudicial punishment as an essential part of their responsibilities to preserve discipline and maintain and effective armed force."[73] The 1962 act expanded the commander's authority by enabling the commander to impose greater punishments.[74] Specifically, the commander was given punishment authority which at the time "approximate[d] those which may be given as a result of a conviction by summary court-martial."[75] New punishment authority included the ability to impose a larger reduction in grade, a higher forfeiture of pay, a longer restriction or extra duty, and it included the ability to impose a new punishment, entitled correctional custody.[76]

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[69] H.R. 11257, 87th Cong. (1962).
[70] S. REP. NO. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2379, 2380.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 2380-81.
[74] *See id.* at 2382-83.
[75] *Id.* at 2382.
[76] *See* SEN. REP. NO. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2379, 2382-83. The Committee explained that correctional custody is a "physical restraint during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor." *Id.* at 2384. The Committee stated that "[t]he purpose of correctional custody is to exercise close supervision over an individual to the end that the cause of his behavior that resulted in the . . . offense may be corrected, without stigmatizing him with a sentence to 'confinement.'" *Id.*

The Senate Armed Services Committee recognized that even with this increased authority to punish, "punishment [under Article 15] is not a bar to trial by court-martial for a serious crime or offense growing out of the same transaction."[77] Furthermore the committee stated these "amendments do not affect the present law that punishment under this article is nonjudicial (sic) and hence is not considered to be a conviction of a crime."[78]

Article 15 has been amended at other times since 1962, but these amendments have been minor and are not relevant to a double jeopardy analysis.[79] The above recitation is more than enough evidence of legislative intent behind the original enactment and subsequent amendment of Article 15 to enable a thorough double jeopardy analysis. At this point then, it is appropriate to set out the current state of the law of Double Jeopardy.

II. Double Jeopardy

A. Current Double Jeopardy Jurisprudence

In order to analyze nonjudicial punishment under the double jeopardy microscope, it is first necessary to outline the most relevant jurisprudence. For purposes of this paper, the relevant areas of this jurisprudence are dual sovereignty and multiple punishments. The Double Jeopardy Clause of the U.S. Constitution provides "nor shall any person be subject for the same offence be twice put in jeopardy of life or limb."[80] The United States Supreme Court has long affirmed, under the Double Jeopardy Clause, the "principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does

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[77] *Id.*
[78] *Id.*
[79] *See* 10 U.S.C. § 815 amendments (1994). Article 15 has been amended three times since 1962, all of the changes have been non-substantive in regards to punishment authority.
[80] U.S. CONST. amend. V, cl. 2.

not bar a federal one."[81] Furthermore, the Court has "recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense."[82] The latter guarantee prohibiting multiple punishments is the one most relevant to this paper.[83] Therefore, the relevant analysis regarding this guarantee is set forth in the next paragraph.

The Court has explained that "[t]he protection from multiple punishments prohibits the Government from 'punishing twice, or attempting a second time to punish criminally for the same offense.'"[84] The Court, in *United States v. Hudson*,[85] has recently announced the appropriate double jeopardy analysis for multiple punishment cases.[86] The Court stated that

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[81] United States v. Wheeler, 435 U.S. 313, 316-17 (1978) (citing Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922)). The Court explained the basis for this doctrine was "that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *Wheeler*, 435 U.S. at 317 (quoting U.S. CONST. amend. V). The Court continued:

> "An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."

Id. at 317 (quoting Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852)) (alterations in original).

[82] Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 306-07 (1984) (citing Illinois v. Vitale, 447 U.S. 410, 415 (1980)); *see also* United States v. Ursery, 518 U.S. 267, 294 (1996) (Kennedy, J., concurring); Jones v. Thomas, 491 U.S. 376, 380-81 (1989); United States v. Pearce, 395 U.S. 711, 717 (1969).

[83] *But see* Washington v. Ivie, 961 P.2d 941 (Wash. 1998) (holding that nonjudicial punishment is a criminal prosecution). *See infra* text accompanying notes 133-160. Furthermore, it is without argument that no acquittal or conviction result from nonjudicial punishment. *See* MCM, Part V, para. 1c (1998) ("[n]onjudicial . . . promotes . . . changes . . . without the stigma of a court-martial conviction).

[84] United States v. Ursery, 518 U.S. 267, 273 (1996) (quoting Witte v. United States, 515 U.S. 389, 396 (1995)) (internal quotes omitted).

[85] 522 U.S. 93 (1997).

[86] *See Hudson*, 522 U.S. at 95-100. The Court was actually reaffirming an older analysis, *see* United States v. Ward, 448 U.S. 242, 248-49 (1980), while disavowing one that had been recently developed, *see* United States v. Halper, 490 U.S. 435, 448 (1989). *See Hudson*, 522 U.S. at 96.

"[t]he Clause only protects against . . . multiple *criminal* punishments."[87] The Court then outlined its analysis:

> Whether a particular punishment is criminal or civil is, at least initially a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label over the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."[88]

The Court explained that when engaging in the second part of the analysis,

> the factors listed in *Kennedy v. Mendoza-Martinez*, provide useful guideposts, including: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[89]

The Court cautioned however, "that 'these factors must be considered in relations to the statute on its face,' and 'only the clearest proof' will suffice to override legislative intent and transform a civil remedy into a criminal penatly."[90]

The above is an outline of the relevant Supreme Court jurisprudence that is used later in this paper to analyze nonjudicial punishment. As was mentioned, the two relevant areas of that jurisprudence are dual sovereignty and multiple punishments. While it is clear that the dual sovereignty principle allows successive prosecutions in federal and state court, states are free to modify this to limit a state's ability to prosecute and many have made this modification.

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[87] *Hudson*, 522 U.S. at 99 (citing Helvering v. Mitichell, 303 U.S. 391, 399 (1938)).
[88] *Id.* (alteration in original) (citations omitted).
[89] *Id.* at 99-100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

B. State Modification

Despite the fact that the dual sovereignty aspect of double jeopardy jurisprudence allows for successive prosecutions in different sovereigns, twenty-eight states have chosen to protect defendants through statutes (twenty-four states) or case law (four states).[91] The statutory modification varies from state to state, but there are six different forms—three that are commonly used and three others that are only used in one state each. First, some states simply bar prosecution if there was conviction or acquittal for the same offense in another jurisdiction, state or federal.[92] Secondly, some states bar prosecution like the first group unless "each [offense] requires proof of a fact not required by the other" offense.[93] The third general group is similar to the second only it provides that prosecution will not be barred if the law defining the offense "is intended to prevent a substantially different harm or evil."[94] The three states that provide statutes that are different from others are Minnesota,[95] New Jersey[96] and Washington.[97]

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[90] *Id.* at 100 (quoting *Kennedy*, 372 U.S. at 169).

[91] The four states who have adopted additional jeopardy protection are Massachusetts, Michigan, Oregon, Tennessee, and Virginia. *See* Commonwealth v. Cepulonis, 373 N.E.2d 1136 (Mass. 1978) (recognizing that double jeopardy doesn't prevent dual sovereign prosecution, but nevertheless would apply a "same evidence test" to offenses at federal and state level, if evidence the same court would bar prosecution); State v. Cooper, 247 N.W.2d 866 (Mich. 1976) (holding that if social interests law is framed to protect do not differ substantially between sovereigns, then prosecution is barred); Lavon v. State, 586 S.W.2d 112 (Tenn. 1979); Epps v. Commonwealth, 216 S.E.2d 64 (Va. 1975) (no jeopardy in this case, but only because each offense required proof of an additional fact that the other did not).

[92] *See* ALASKA STAT. § 12.20.010 (Michie 1995); CAL. PENAL CODE § 656 (West 1999); IDAHO CODE § 19-315 (1997); IND. CODE ANN. § 35-41-4-5 (Michie 1998); MISS. CODE ANN. § 99-11-27 (1994); MONT. CODE ANN. § 46-11-504 (1997); NEV. REV. STAT. § 193.280 (1997); N.D. CENT. CODE § 29-03-13 (1991); OKLA. STAT. ANN. tit. 22, § 130 (West 1992); UTAH CODE ANN. § 76-1-404 (1995).

[93] GA. CODE ANN. § 16-1-8(c) (Harrison 1994) (former prosecution in District Court of United States, no provision for other states); ILL. COMP. STAT. ANN. 5/3-4(c) (West 1993) (former prosecution in District Court of United States or sister state); KAN. STAT. ANN. § 21-3108(3) (1995) (former prosecution in District Court of United States or sister state); KY. REV. STAT. ANN. § 505.050 (Michie 1990); WIS. STAT. ANN. § 939.71 (West 1996).

[94] ARK. CODE ANN. § 5-1-114 (Michie 1997); COLO. REV. STAT. ANN. § 18-1-303 (West 1998); DEL. CODE ANN. tit. 11, § 209 (1995); HAW. REV. STAT. ANN. § 701-112 (Lexis 1999); N.Y. PENAL LAW §§ 40.20-.30 (McKinney 1992); 18 PA. CONS. STAT. ANN. § 111 (West 1998).

[95] *See* MINN. STAT. ANN. § 609.045 (West 1987) (requiring that the elements of each offense be identical as to both law and fact).

In addition to these six types, there are a few other statutes that proscribe subsequent prosecutions for specific offenses.[98] Although these states have extended double jeopardy protection by statute, some of the states have still had cases where subsequent prosecutions were allowed.[99]

In contrast to those states that protect defendants from successive prosecutions, many states have affirmatively approved the practice. In fact, one state, Louisiana, has approved of the practice by statute.[100] Although Louisiana is the only state to go this far, many states have approved of the practice through case law.[101]

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[96] *See* N.J. STAT. ANN. § 2C:1-11 (West 1995). New Jersey's statute is similar to the second and third group. However, the only prosecutions that it specifies will be barred are those in a District Court of the United States. Additionally, the statute provides for no bar to prosecution if the offense in New Jersey was designed to prevent "more serious harm or evil than" the federal offense. *Id.*

[97] *See* WASH. REV. CODE ANN. § 10.43.040 (West 1990). Washington's statute provides:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

Id. This statute in most respects tracks the language of those statutes in the first group, however it adds a couple of things. First, it is the only statute that purports to only bar prosecution for an "offense . . . committed in another state or country." *Id.* Secondly, besides California and Nevada, it is the only statute that qualifies prosecution with the word criminal. *See* CAL. PENAL CODE § 656 (West 1999); NEV. REV. STAT. § 193.280 (1997); WASH. REV. CODE ANN. § 10.43.040 (West 1990).

[98] For instance three states bar a subsequent prosecution for dueling. *See* MASS. GEN. LAWS ch. 265, § 5 (1996); R.I. GEN. LAWS § 11-12-5 (1994); W. VA. CODE § 61-2-23 (1997). In addition, Michigan and North Carolina bar subsequent prosecutions for violations of its Controlled Substance Act. *See* MICH. COMP. LAWS ANN. § 333.7409 (West 1992); N.C. GEN. STAT. § 90-97 (1997). Finally, Tennessee bars prosecutions for crimes previously prosecuted by court-martial in the armed forces. *See* TENN. CODE ANN. § 40-16-101 (1997).

[99] *See generally* Annotation, *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts—Modern View*, A.L.R.4th 802, 816, § 6(a) (1998).

[100] *See* LA. CODE CRIM. PROC. ANN. art. 597 (West 1981). The statute states: "Double jeopardy does not apply to a prosecution under a law enacted by the Louisiana Legislature if the prior jeopardy was in a prosecution under the laws of another state or the United States." *Id.*

[101] *See* State v. Berry, 650 P.2d 1246 (Ariz. Ct. App. 1982); State v. Moeller, 420 A.2d 1153 (Conn.), *cert. denied*, 444 U.S. 950 (1979); Booth v. State, 436 So. 2d 36 (Fla. 1983); State v. Shafranek, 576 N.W.2d 115 (Iowa 1998); State v. Castonguay, 240 A.2d 747 (Me. 1968); Evans v. State, 481 A.2d 1135 (Md. 1984), *cert. denied sub nom.* Grandinson v. Maryland, 470 U.S. 1034 (1985); State v. Turley, 518 S.W.2d 207 (Mo. 1974), *cert. denied*, 412 U.S. 966 (1975); State v. Pope, 211 N.W.2d 923 (Neb. 1973), *cert. denied*, 416 U.S. 977 (1974); State v. Hogg, 385 A.2d 844 (N.H. 1978); State v. Rogers, 566 P.2d 1142 (N.M. 1977); State v. Harrison, 114 S.E. 830 (N.C. 1922); State v. Fletcher, 271 N.E.2d 567 (Ohio 1971), *cert. denied sub nom.* Walker v. Ohio, 404 U.S. 1024 (1972); State v. Charlesworth, 951 P.2d 153 (Or. Ct. App. 1997), *appeal denied*, 961 P.2d 216 (Or. 1998); State v. Moseley, 114

This state modification of the dual sovereignty principle impacts the analysis of Article 15 nonjudicial punishment in situations where the punishment has been imposed before a state prosecution. Also relevant to a complete analysis of the double jeopardy implications on nonjudicial punishment, is the relevant military law concerning double jeopardy, therefore it is outlined in the next subsection.

C. Double Jeopardy in the Military

To ensure a complete analysis the relevant military law regarding double jeopardy is outlined for both courts-martial and nonjudicial punishment.

1. *Courts-Martial*

Article 44 of the UCMJ[102] deals with former jeopardy in the case of courts-martial. It specifies that "[n]o person may, without his consent, be tried a second time for the same offense."[103] Furthermore, the article states that "[n]o proceeding in which an accused has been found guilty by court-martial . . . is a trial . . . until the finding of guilty has become final after review of the case has become fully completed."[104] Finally, the article provides that "[a] proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or the prosecution for failure of evidence or witnesses without any fault of the accused is a trial . . . ."[105]

These statutory mandates are further developed in the Rules for Courts Martial in Part II of the MCM. Specifically, R.C.M. 907(b)(2)(C) provides that a dismissal is appropriate if "[t]he

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S.E. 866 (S.C. 1922); State v. Stewart, 652 S.W.2d 496 (Tex. Ct. App. 1983); State v. O'Brien, 170 A. 98 (Vt. 1934); *Re* Murphy, 40 P. 398 (Wyo. 1895).

[102] 10 U.S.C. § 844 (1994).

[103] *Id.*

[104] *Id.*

[105] *Id.*

accused has been tried by court-martial or federal civilian court for the same offense."[106] Furthermore, R.C.M. 907(b)(2)(D) provides in relevant part that prosecution is barred by previous punishment under Article 15 for the same offense, if the offense was minor. Finally, R.C.M. 201(d)(2) provides that "[a]n act or omission which violates both the [UCMJ] and local criminal law, foreign or domestic, may be tried by court-martial, or by a proper civilian tribunal, foreign or domestic, or, subject to R.C.M. 907(b)(2)(C) and regulations of the Secretary [of the service] concerned, by both."[107] The discussion accompanying this rule notes that that while "it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act."[108]

Thus double jeopardy protection for courts-martial guarantees only the minimum constitutional protections. The UCMJ and the MCM simply restate basic double jeopardy guarantees—successive courts-martial or courts-martial following federal court prosecutions are impermissible. This result follows because a federal or military prosecution are conducted by the same sovereign—the United States government. However, the MCM, as spelled out above in R.C.M. 201(d)(2), recognizes that it would be permissible to conduct a court-martial, even though a particular defendant has been tried in a state court. Although the discussion to the rule states that the better policy is to not prosecute, the rule by its terms permits the Secretary of the service concerned to promulgate rules for conducting such prosecutions. The service secretarys have done this to varying degrees.

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[106] MCM, R.C.M. 907(b)(2)(C) (1998).
[107] *Id.*, R.C.M. 201(d)(2).
[108] *Id.* discussion.

The policies of the services vary in the level of authority required to authorize successive prosecutions. The applicable Army regulation specifies that "a person subject to the UCMJ who has been tried in a civilian court may, but ordinarily will not, be tried by court-martial or punished under Article 15, UCMJ, for the same act over which that civilian court has exercised jurisdiction."[109] The regulation provides that the officer exercising general court-martial authority may authorize nonjudicial punishment or convene a court-martial in these circumstances.[110] This is a relatively low-level of authority. In contrast the Navy-Marine Corps regulation, JAGMAN, is somewhat more restrictive. JAGMAN provides that a trial or nonjudicial punishment shall be authorized only in limited circumstances, where it "is considered essential in the interests of justice, discipline, and proper administration within the naval service."[111] The JAGMAN provides that for a general or special court-martial only the Judge Advocate General may grant permission for successive trial.[112] In cases of a summary court-martial or nonjudicial punishment, the officer exercising general court-martial authority may approve action following a state trial.[113] The Air Force policy is even more restrictive. The applicable regulation provides that "[o]nly [the Secretary of the Air Force] may approve

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[109] AR 27-10, para. 4.2.

[110] *See id.* para. 4.3.

[111] JAGMAN 0124a. The JAGMAN specifies the criteria such a case must meet to allow for a trial or nonjudicial punishment following a state trial:

> (1) Cases in which punishment by civil authorities consists solely of probation, and local practice, or the actual terms of probation, do not provide rigid supervision of probationers, or the military duties of the probationer make supervision impractical.
> (2) Cases in which civilian proceedings concluded without conviction for any reason other than acquittal after trial on the merits.
> (3) Other cases in which the interests of justice and discipline are considered to require further action under the UCMJ (e.g., where the conduct leading to trial before a state or foreign court has reflected adversely upon the naval service or when a particular and unique military interest was not or could not be adequately vindicated in the civilian tribunal).

Id. 0124b.

[112] *See id.* 0124c.

[113] *Id.*

initiation of court-martial or Article 15, UCMJ, action against a member . . . previously tried by a state . . . court for the same act or omission."[114] The regulation further states "[p]ermission will be granted in only the most unusual cases, when the ends of justice and discipline can be met in no other way."[115]

While, the authority to execute successive prosecutions varies among the services, one thing is clear, it is authorized. In fact such successive action was recently judicially approved. In *United States v. Bordelon*,[116] an Army soldier was court-martialed after being convicted in state court for drunk-driving.[117] The court specifically addressed the general court-martial officer's authority to make such decisions under the Army regulation discussed above and concluded that the action was permissible.[118]

Although this discussion has intimated some of the military's position on double jeopardy and use of nonjudicial punishment, there is further guidance that applies to nonjudicial punishment alone. This guidance is spelled out below.

2. *Nonjudicial Punishment*

Article 15 itself deals with former jeopardy in that it specifies that

> [t]he imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial for court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.[119]

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[114] AFI 51-201, para. 2.5.2 (1997).
[115] *Id.*
[116] 43 M.J. 531 (Army Ct. Crim. App. 1995), *review denied*, 44 M.J. 47 (C.A.A.F. 1996).
[117] *See Bordelon*, 43 M.J. at 533.
[118] *See id.* at 534-35.
[119] 10 U.S.C. § 815(f) (1994).

As in the case of courts-martial, the MCM provides further guidance.[120] Specifically, Part V of the MCM provides that punishment may not be imposed twice for the same offense under Article 15,[121] nor may nonjudicial punishment be increased once it has been imposed.[122] Furthermore, "[n]on-judicial punishment may not be imposed for an offense tried by a court which derives its authority from the United States. Nonjudicial punishment may not be imposed for an offense tried by a State or foreign court unless authorized by regulations of the Secretary concerned."[123] This is similar to the prohibition of courts-martial following state court trials. In fact, the provisions of the service regulations outlined above under the court-martial discussion are each phrased to cover both successive prosecution by court-martial or subsequent action by nonjudicial punishment.[124] Thus, the same provisions apply equally to nonjudicial punishment following a state court trial.

The use of a court-martial following nonjudicial punishment under 10 U.S.C. § 815(f), quoted above, for the same offense has been judicially approved in *United States v. Pierce*.[125] In that case, the defendant challenged that a subsequent court-martial following nonjudicial punishment for the same offense violated due process.[126] The court stated that "absent some sinister design, evil motive [or] bad faith, on the part of military authorities, it is not a violation of military due process to court-martial a member for a serious offense" after he has been nonjudicially punished for the same offense.[127] But, the court stated that it did not follow that a

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[120] *See* MCM, Part V, para. 1f (1998).
[121] *See id.* para. 1f(1).
[122] *See id.* para. 1f(2).
[123] *See id.* para. 1f(5).
[124] *See supra* text accompanying notes 109-116.
[125] 27 M.J. 367 (C.M.A. 1989); *see also* United States v. Fretwell, 11 C.M.A. 377, 29 C.M.R. 193 (C.M.A. 1960) (holding Article 44 (former jeopardy), 10 U.S.C. § 844, does not apply to nonjudicial punishment by its terms).
[126] *See Pierce*, 27 M.J. at 368.
[127] *See id.* at 368-69.

defendant can be punished twice for that offense.[128] Accordingly, the court held "an accused must be given complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe."[129]

III. The Cases

The relevant background of nonjudicial punishment and double jeopardy was outlined in the previous two sections, and the former will be analyzed with respect to the latter in the next section. However, prior to that analysis, recent relevant case law should be reviewed. That review is provided here. There are three cases that are particularly relevant: one in a state court, *Washington v. Ivie*;[130] one in a military court, *United States v. Gammons*;[131] and one in a federal court, *United States v. Burns*.[132] These cases, with attendant facts and analyses are set out below.

A. *Washington v. Ivie*

1. *Facts*

In *Washington v. Ivie*,[133] the defendants, two enlisted Navy servicemen, were charged with driving-while-under-the-influence-of alcohol.[134] Both had been punished under a captain's mast proceeding, i.e. nonjudicial punishment, for these offenses and were subsequently prosecuted by the State of Washington.[135] The district court dismissed the charges, citing a Washington statute that precludes criminal prosecution if another sovereign has prosecuted the same defendant for the same offense.[136] The superior court reversed the district court and the Washington Supreme

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[128] *See id.* at 369.
[129] *Id.*
[130] 961 P.2d 941 (Wash. 1998).
[131] 48 M.J. 762 (C.G. Ct. Crim. App.), *review granted*, No. 98-5031 (C.A.A.F. 1998).
[132] 29 F. Supp.2d 318 (E.D. Va. 1998) (order denying motion to dismiss).
[133] 961 P.2d 941 (Wash. 1998).
[134] *See Ivie*, 961 P2d at 942=43.
[135] *See id.*
[136] *See id.*

Court took up the case on discretionary review.[137] The issue before the court was whether Washington's former prosecution law "provides a defense to military personnel, who have faced 'nonjudicial punishment' under Article 15 . . ., from state prosecution for a crime committed in the State of Washington."[138]

2. *Majority*

The Supreme Court of Washington, first laid out the former jeopardy statute. The court noted that the statute provides, in relevant part:

> Whenever, upon the trial of any person for a crime, . . . the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the laws of [another] state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.[139]

The court noted that it was undisputed that the United States military is a another state or country under the statute.[140] Additionally, the court noted that it was undisputed that the state was trying to prosecute these defendants for the same act for which they were punished in the captain's mast.[141] Thus, the court narrowed the issue to whether nonjudicial punishment constitutes a criminal proceeding for purposes of the statute.[142]

The court began addressing this issue by defining "criminal prosecution" as that term is used in the Washington statute. As an initial matter, the court noted that the term "criminal prosecution" was not defined in the statute.[143] Accordingly, the court fashioned a definition by utilizing the *Black's Law Dicitionary* definition and modifying it to fit the appropriate statutory

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[137] *See id.* at 942.
[138] *Id.* at 943.
[139] *Ivie*, 961 P.2d at 943.
[140] *See id.*
[141] *See id.*
[142] *See id.*
[143] *See id.*

context.[144] The court stated that the Washington Statute is a double jeopardy statute and as such, "criminal prosecution" is used to mean a proceeding sufficient to constitute jeopardy under double jeopardy jurisprudence.[145] The court sifted through its prior interpretation of the statute and determined that the applicable double jeopardy jurisprudence indicates that double jeopardy prohibits "multiple punishments for the same offense."[146] Thus, the court defined "criminal prosecution" to encompass "a proceeding instituted under the rules of law to determine the guilt or innocence of a person accused of committing a criminal act where such proceeding threatens 'punishment' under double jeopardy jurisprudence."[147]

With the definition of "criminal prosecution" in place, the court proceeded to analyze nonjudicial punishment under this definition. The court started this analysis by a general recitation of the military justice system, followed by a more specific recitation of nonjudicial punishment. For the most part, the court cited the Manual for Courts-Martial as support for this recitation. However, when the court stated that "[t]o impose nonjudicial punishment a commander must find the accused service member guilty beyond a reasonable doubt[,]" it cited *Military Law in a Nutshell*.[148] The court noted that nonjudicial punishment is final under military law.[149] After this recitation the court concluded "[i]n sum, the nonjudicial punishment is a formalized procedure to fully and finally adjudicate and dispose of minor offenses in the military."

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[144] *Ivie*, 961 P2d at 943.
[145] *See id.* at 944.
[146] *Id.* (quoting State v. Catlett, 945 P.2d 700, 703 (Wash. 1997)) (internal quotes omitted).
[147] *Id.* at 945.
[148] *Id.* at 946 (citing CHARLES A. SHANOR & L. LYNN HOGUE, MILITARY LAW IN A NUTSHELL 109 (2d ed. 1996)).
[149] *See id.* The court also noted that the MCM prohibits multiple nonjudicial punishment for the same offense. *See id.* (citing MCM, Part V, para. 1f(1) (1998)).

Applying the definition of criminal prosecution fashioned by the court the court stated that "it is evident that nonjudicial punishment is indeed a final adjudication of guilt or innocence for a criminal violation with attendant punishment administered by competent authorities. Thus, nonjudicial punishment necessarily constitutes criminal prosecution under our statute."[150] Despite this conclusion, the court further analyzed "whether Congress affixed a criminal/punitive or civil/remedial label to the proceeding."[151] The court noted that if the label is punitive then the proceeding invokes jeopardy. The court concluded that since the name was nonjudicial *punishment*, that indicated that Congress labeled the proceeding punitive.[152] Continuing, the court stated that nonjudicial punishments is used to punish those offenses that are outlined in the punitive articles of the UCMJ. This fact led the court to note that "[t]he fact that 'the behavior to which [the sanction] applies is already a crime' further indicates the proceeding constitutes jeopardy."[153] Finally the court observed that punishment that may be imposed under a nonjudicial proceeding includes confinement or confinement on bread and water and concluded that "[a]ny proceeding which threatens to impose imprisonment for a criminal violation surely constitutes jeopardy."[154] This all led the court to ultimately conclude that "[n]onjudicial punishment fits squarely within the dictionary definition of 'criminal prosecution' . . . and constitutes jeopardy . . . as it unquestionably is intended to be punishment."[155]

3. *Dissent*

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[150] *Ivie*, 961 P.2d at 946.
[151] *Id.* at 946 (quoting Catlett, 945 P.2d at 705).
[152] *See id.*
[153] *Id.* at 947 (quoting *In re* Personal Restraint of Young, 857 P.2d 989, 998 (Wash. 1993)) (alteration in original).
[154] *Id.*
[155] *Id.* at 948. In so concluding the court rejected an argument that the United States Supreme Court's holding in *Middendorf v. Henry*, 425 U.S. 25 (1976) mandated a different result. In *Middendorf*, the Supreme Court held that military members tried by a summary court-martial were not entitled to counsel. *See Middendorf*, 425 U.S. at 48.

This case was a 5-4 decision and the dissent strongly criticized the majority for not invoking a proper analysis.[156] The dissent looked at congressional intent and other federal law and noted that nonjudicial punishment is noncriminal in nature and many cases have held that it is not a criminal prosecution.[157] The dissent also noted that the legislative history indicates that Congress did not intend nonjudicial punishment to be a criminal proceeding.[158] The dissent stated that the court ignored the proper double jeopardy analysis under the Washington and United States Supreme Courts' applicable jurisprudence.[159] The dissent noted that nonjudicial punishment is simply a tool to maintain discipline and concluded that it is not a criminal prosecution.[160]

B. *United States v. Gammons*

1. *Facts and Opinions*

United States v. Gammons[161] was a rehearing of an earlier opinion.[162] The United States Coast Guard Court of Criminal Appeals grappled with the issue of using evidence of nonjudicial punishment at a subsequent court-martial for the same offense. The defendant in this case had been nonjudicially punished for marijuana use, subsequently he was tried by a special court-martial for this offense and for use and wrongful distribution of LSD.[163] The prosecution utilized the evidence of the prior punishment as an aggravating factor on sentencing.[164] The defendant appealed claiming he was deprived of a fair sentencing because of the prosecution's of prior

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[156] *See Ivie*, 961 P.2d at 948-52 (Guy, J., dissenting). The dissent noted that "[i]nstead of looking to congressional intent and federal law . . ., the majority looks to the dictionary." *Id.* at 949.
[157] *See id.* at 949-50.
[158] *See id.* at 950 (citing S. REP. NO. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N 2379.
[159] *See id.* at 951 (citing Hudson v. United States, 522 U.S. 93 (1997); *In re* Young, 857 P.2d 989 (Wash. 1993)).
[160] *See id.* at 951-52.
[161] 48 M.J. 762 (C.G. Ct. Crim. App. 1998) [hereinafter *Gammons II*].
[162] 47 M.J. 766 (C.G. Ct. Crim. App. 1997), *adhered to on reconsideration*, 48 M.J. 762 (C.G. Ct. Crim. App. 1998) [hereinafter *Gammons I*].
[163] *See Gammons I*, 47 M.J. at 766-67.
[164] *See id.* at 767.

punishment and by the judge's failure to give him proper credit for his prior punishment under *United States v. Pierce*.[165] The Coast Guard Court of Criminal Appeals set aside the sentence and remanded for a sentencing rehearing.[166] The court ordered a rehearing based on the possible effect of *United States v. Hudson*[167] on *Pierce*.[168]

The rehearing decision affirmed its original holding that a sentence rehearing was required, but the decision was fragmented into three opinions.[169] In an opinion announcing the judgment of the court, Chief Judge Baum analyzed nonjudicial punishment under the double jeopardy analysis of the Supreme Court's holding in *Hudson*. Specifically, the chief judge noted that after *Hudson* it is clear that a judicial proceeding is not necessary to invoke the Double Jeopardy Clause.[170] The chief judge concluded that unless there is reason to exclude military disciplinary action from the Supreme Court's double jeopardy cases, "nonjudicial punishment falls squarely under the terms of the Fifth Amendment."[171] The chief judge concluded that nonjudicial punishment is a criminal penalty as opposed to a civil remedy because Congress has "manifested a plain intent that NJP be a criminal saction."[172] The chief judge stated that when applying the seven guideposts, as outlined in *Hudson*, he concludes that nonjudicial punishment constitutes criminal punishment.[173] The chief judge went further to explain that if these conclusion are correct, nonjudicial punishment would bar subsequent court-martial action, despite Congress's

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[165] *See id.* at 766-67. For a discussion on *United States v. Pierce,* 27 M.J. 367 (C.M.A. 1989), see *supra* text accompanying notes 129-133.
[166] *See id.* at 768.
[167] 522 U.S. 93 (1997). *See supra* text accompanying notes 85-90.
[168] *See Gammons II*, 48 M.J. at 763.
[169] *See id.* (Baum, C.J., opinion announcing judgment); *id.* at 766 (Kantor, J., concurring); *id.* (Weston, J., dissenting).
[170] *See id.* at 763.
[171] *Id.* at 764.
[172] *Id.* (quoting Appellant's Answer Brief of 17 February 1998, at 13).
[173] *See Gammons II*, 48 M.J. at 764.

approval in 10 U.S.C. § 815(f).[174] The chief judge noted though that whatever his conclusions, he must follow applicable military rulings until they are modified by the United States Court of Appeals for the Armed Forces.[175] Thus, the chief judge held that a subsequent trial by court-martial in this case was not barred, but he also held that a subsequent court-martial for the same offense voids the nonjudicial punishment.[176] Accordingly, the defendant in such a situation should have the punishment expunged from his records and "all lost rights, privileges, and property should be restored."[177] Thus, the chief judge concluded that the prior nonjudicial punishment was void and the defendant should have all lost rights restored, then be sentenced in a rehearing.[178]

Judge Kantor concurred in the opinion that rehearing on sentencing was necessary.[179] Although, Judge Kantor stated that he shared similar concerns with the chief judge about "the use of prior nonjudicial punishment at a subsequent court-martial for the same offense,"[180] he stated that he was not ready to conclude that *Hudson* "stands for the proposition that [nonjudicial] punishment [is] . . . criminal punishment for double jeopardy purposes."[181] But he did fully support the conclusion that defendant's nonjudicial punishment should be expunged from his

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[174] *See id.*; *see also supra* text accompanying note 119.
[175] *See id.* (citing United States v. Kelly, 45 M.J. 259 (C.A.A.F. 1996)).
[176] *See id.* at 765.
[177] *Id.* The chief judge reasoned that when the commanding officer deciding to give nonjudicial punishment, he/she determines that the offense is minor. However, a subsequent decision to refer that same offense to a court-martial is a realization that the offense is serious and nonjudicial punishment is not appropriate. The chief judge concluded that "[w]hen the seriousness of the offense is confirmed by trial and conviction, those actions should serve to void the prior nonjudicial punishment . . . ." *Id.*
[178] *See id.*
[179] *See Gammons II*, 48 M.J. at 766 (Kantor, J., concurring).
[180] *Id.*
[181] *Id.*

record and declared void.[182] He concluded that this would enhance "the reputation of the military justice system without denying a commander the ability to address disciplinary problems."[183]

The dissent, Judge Weston, stated that this case could be cured by a simple adjustment to the sentence under *Pierce* without a rehearing.[184] The judge otherwise made no comments concerning *Hudson's* applicability to nonjudicial punishment.

2. *Current Posture of the Case*

The case is currently before the United States Court of Appeals for the Armed Forces (CAAF) for review.[185] While the issues under review do not include a mention of *Hudson's* applicability to nonjudicial punishment, there may be some comment by the court on that matter. The court heard oral argument on October 7, 1998[186] and an opinion should be forthcoming.

C. *United States v. Burns*

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[182] *See id.*

[183] *Id.*

[184] *See id.* (Weston, J., dissenting).

[185] *See* United States Court of Appeals for the Armed Forces Daily Journal 98-200 (Jul. 22, 1998) (visited Apr. 29, 1999) <http://www.armfor.uscourts.gov/journal/1998Jrnl/Jul.htm>. The Court granted review on the following issues:

> I. Did the Coast Guard Court of Criminal Appeals err in holding, as a matter of law, that the trial counsel's use of a record of the accused's nonjudicial punishment (NJP) amounted to plain error under U.S. v. Pierce, even though:
> (A) The NJP was used as an aggravating circumstance of a later similar crime for which the accused was convicted;
> (B) The defense stated that it had no objection to the trial counsel's use of the NJP; and
> (C) Under the circumstances the introduction of the record of NJP was the equivalent of an introduction by the defense?
>
> II. Did the Coast Guard Court of Criminal Appeals err in ordering expungement of a record of nonjudicial punishment from Gammons' military record and restoration of all rights, privileges, and property prior to rehearing of the sentence?

Id.

[186] *See* United States Court of Appeals for the Armed Forces Daily Journal 99-4 (Oct. 7, 1998) (visited Apr. 29, 1999) <http://www.armfor.uscourts.gov/journal/1998Jrnl/Oct.htm>.

In *United States v. Burns,*[187] a magistrate judge denied a defendant's motion to dismiss on double jeopardy grounds.[188] The defendant, an enlisted Navy sailor, was charged with attempted larceny of government property of a value not exceeding $1000 from a Navy Exchange in Norfolk, Virginia.[189] In early June 1998, a criminal information was filed in federal court charging him with the aforementioned larceny in violation of 18 U.S.C. § 641.[190] Approximately three weeks later, the defendant received nonjudicial punishment from his commanding officer. The punishment included a thirty day restriction to his unit, extra duties for thirty days, forfeiture of half of one month's pay and a suspended reduction of one pay grade.[191] The defendant subsequently filed a motion to dismiss the charge on double jeopardy grounds.[192]

In denying the motion the court analyzed relevant double jeopardy principles. Initially, the court noted that the Double Jeopardy Clause protects against successive prosecutions after acquittal or conviction and against multiple punishments for the same offenses.[193] The court stated that this was only a case of multiple punishments, because the defendant was not facing a second prosecution following a conviction or acquittal.[194] Before applying the relevant analysis, the court discussed the *Gammons* opinion briefly.[195] The court agreed with the *Gammons* court's observation that the United States Supreme Court's *Hudson* decision provides the appropriate analysis as to whether nonjudicial punishment falls within double jeopardy

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[187] 29 F. Supp.2d 318 (E.D. Va. 1998) (order denying motion to dismiss on double jeopardy grounds).
[188] *See Burns*, 29 F. Supp.2d at 319.
[189] *See id.* at 318-19.
[190] *See id.* at 319.
[191] *See id.*
[192] *See Burns*, 29 F. Supp.2d at 319.
[193] *See id.* at 320.
[194] *See id.*
[195] *See id.* at 320-21.

protection.[196] However, the court noted that the *Gammons* court did not apply the analysis completely.[197]

The court then applied the analysis spelled out in the Supreme Court's *Hudson* decision and concluded nonjudicial punishment is not criminal punishment for purposes of double jeopardy.[198] Applying the first step of the analysis, the court noted that the legislative history, the MCM, and case law all indicate that nonjudicial punishment was not intended to be criminal.[199] The court noted that despite this finding, the test calls for considering whether the "form and effect of NJP sanction renders it criminal in fact."[200] The court went on to apply the seven factors espoused by the Supreme Court and held that there wasn't the clearest proof necessary to negate the legislative intent that nonjudicial punishment is non-criminal.[201]

IV. ANALYSIS

The prior three sections outlined nonjudicial punishment, the relevant double jeopardy jurisprudence, and current cases analyzing nonjudicial punishment in a double jeopardy context. This sections synthesizes this background and proposes the appropriate analysis of nonjudicial punishment in a double jeopardy context. First, the three cases outlined in the previous section are analyzed to sort out all of their strengths and weaknesses. This is accomplished so that when the proposed analysis for nonjudicial punishment in the double jeopardy context is set out in subsection B, the strengths are incorporated and the weaknesses are discarded.

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[196] *See id.* at 321.

[197] *See Burns*, 29 F. Supp.2d at 322. The problem was that the *Gammons* court did not analyze nonjudicial punishment under the guideposts set out in *Hudson*. The *Burns* court noted that "the *Gammons* court merely listed the seven factors . . . and did not provide their analysis." *Id.*

[198] *See id.* at 321; *see also supra* text accompanying notes 85-90.

[199] *See id.* at 322. For legislative history the court cited S. REP. NO. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2379. For case law the court cited *Middendorf v. Henry*, 425 U.S. 25 (1976); *Wales v. United States*, 14 Cl. Ct. 580, 587 (1988).

[200] *Burns*, 29 F. Supp.2d at 322.

A. The Cases

Reflecting on the background discussion above, it is obvious that the three cases are different. One is a federal district court case, one is a military court case, and the other is a state supreme court case. Hence, they all raise the nonjudicial-double jeopardy analysis in a different context. The state case, *Washington v. Ivie*,[202] raises issue of the state trial following use of nonjudicial punishment for the same offense; the military court case, *United States v. Gammons*,[203] raises the issue of a military court-martial following the use of nonjudicial punishment for same offense; and the federal district court case, *United States v. Burns*,[204] raises the issue of a federal civilian court trial following the use of nonjudicial punishment for the same offense. Each of these cases are analyzed below to synthesize what, if anything, they provide to the analysis of nonjudicial punishment under a double jeopardy microscope.

1. Washington v. Ivie

The *Ivie* case adds nothing to the analysis. Despite the fact that it was a case in which a state supreme court was interpreting and applying a state statute, the court's analysis was flawed in several respects and thus should not be considered good authority for any analysis of nonjudicial punishment in a double jeopardy context, be it statutory or constitutional. The analytical flaws are set out below.

In the first instance the court did not even read its statute correctly. The statute reads:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the

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[201] *See id.* at 323-24.
[202] 961 P.2d 941 (Wash. 1998).
[203] 48 M.J. 762 (C.G. Ct. Crim. App. 1998).
[204] 29 F. Supp.2d 318 (E.D. Va. 1998).

> laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.[205]

The majority, in quoting the statute, left out the part which states "it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof."[206] In this case, the defendants' conduct took place inside the state of Washington,[207] thus it would appear that the statute would not even apply to the prosecutions in this case. There was no discussion of this issue by either the majority or the dissent.

Assuming *arguendo* that the court could have held that this part of the statute was mere surplusage, the analysis contains many more flaws. As a general matter the court applied the wrong analysis in the first place and once it applied that analysis, it did so using faulty information. As discussed earlier in the paper, the majority analyzed the case by deciding espousing a definition of "criminal prosecution" by using the dictionary and double jeopardy jurisprudence. The court stated this definition as follows: "[a] 'criminal prosecution' [includes] a proceeding instituted under the rules of law to determine guilt or innocence of a person accused of committing a criminal act where such proceeding threatens 'punishment' under double jeopardy jurisprudence."[208] The double jeopardy jurisprudence to which the court refers are a few cursory statements citing other Washington Supreme Court cases. The first statement was

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[205] WASH. REV. CODE ANN. § 10.43.040 (West 1990).

[206] *See* Washington v. Ivie, 961 P.2d 941, 943 (Wash. 1998).

[207] *See Ivie*, 961 P.2d at 942-43.

[208] *Id.* at 945. The court's dictionary definition was "[a] criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime." *Id.* at 943 (quoting BLACK'S LAW DICTIONARY 1221 (6th ed. 1990)). Comparing this definition to the one the court came up with, one can see they left out "before a competent tribunal" as part of their definition. Clearly, nonjudicial punishment is not carried on before a tribunal, thus this seems to be a convenient omission. However, as will be seen, the appropriate analysis does not require a judicial proceeding or tribunal to invoke double jeopardy protection.

that "the clause prohibits multiple punishments for the same offense."[209] In a second statement the court stated "[u]nder double jeopardy jurisprudence we consider whether Congress affixed a criminal/punitive or civil/remedial label to the proceeding."[210] In a final statement the court stated "[t]he fact that 'the behavior to which [the sanction] applies is already a crime' further indicates the proceeding constitutes jeopardy."[211]

At first blush it may appear that the court was simply citing its own decisions in applying a double jeopardy analysis that is different than the United States Supreme Court, however, upon further inspection that is not the case. The Washington Court cites *State v. Catlett*[212] and *In re Personal Restraint of Young*,[213] both of which adopt the United States Supreme Court's analysis. The analysis those cases adopted is the two-part test set out in *Hudson*.[214] The problem with the *Ivie* court's opinion is that it did not use this analysis. The court did comment that Congress labeled the proceeding "nonjudicial punishment" and concluded that this label is punitive and thus, that should end the inquiry.[215] The court probably thought they were applying the first part of the *Hudson* test. However, it was incomplete, as the court had announced in *Young* that for

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[209] *Ivie*, 961 P.2d at 944 (quoting State v. Catlett, 945 P.2d 700, 703 (Wash. 1997)).
[210] *Id.* at 946 (citing *Catlett*, 945 P.2d at 704-05).
[211] *Id.* at 947 (quoting *In re* Personal Restraint of Young, 857 P.2d 989, 998 (Wash. 1993)) (alteration in original).
[212] 945 P.2d 700 (Wash. 1997).
[213] 857 P.2d 989 (Wash. 1993).
[214] *See Catlett*, 945 P.2d at 705-07; *Young*, 857 P.2d at 996-1000. In *Young* and *Catlett* the Washington Supreme Court did not specifically cite *Hudson*. That would have been impossible *Young* was decided in 1993 and *Catlett* was decided in October 1997, whereas *Hudson* was decided in December 1997. However, *Young* did cite *United States v. Ward*, 448 U.S. 242 (1980) and restated the United States Supreme Court's two-prong analysis, complete with the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) factors used in the second prong of that analysis. *See Young*, 857 P.2d at 996-98; *see also* discussion on *Hudson* analysis *supra* text accompanying notes 85-90. The *Ward* analysis is the same as the *Hudson* analysis, in fact the *Hudson* Court noted that it was reaffirming *Ward*. *See* Hudson v. United States, 522 U.S. 93, 96 (1997). In *Catlett*, the Washington Supreme Court "expressly adopted the two-part test of . . . Young." *Catlett*, 945 P.2d at 705.
[215] The reasoning being that "punishment" means punitive, supposedly the qualifier "nonjudicial" adds nothing to the court's analysis.

the first part of the test "we look . . . to the language of the [s]tatute and the legislative history."[216] But, the court did not look at any legislative history, thus it did not accomplish the proper analysis.[217]

Similarly, the court probably thought they were invoking the second part of the analysis when they made the statement that further evidence of jeopardy is if the behavior being punished is already a crime.[218] However, this statement by the court is not any analysis at all. It was simply restating one of the seven *Kennedy v. Mendoza Martinez* factors. However, meeting one of the factors is not sufficient under the second prong of the analysis. Those factors are merely guideposts and the ultimate test is whether the "clearest proof that the . . . proceeding[s] [is] so punitive in form as and effect as to render [it] criminal despite Congress's intent to the contrary."[219] Thus, the court failed to properly analyze nonjudicial punishment under double jeopardy jurisprudence although it intimated that is what it was doing by attempting to fit nonjudicial punishment within its definition of "criminal prosecution."

Not only did the court fail to properly analyze under current double jeopardy jurisprudence,[220] but they failed to even apply their own analysis using reliable information. As mentioned above the court analyzed nonjudicial punishment by seeing if it met the definition the court fashioned for criminal prosecution.[221] As noted, the court stated that criminal prosecution included a

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[216] *Young*, 857 P.2d at 996.

[217] The dissent noted this flaw in the opinion. *See Ivie*, 961 P.2d at 948-51 (Guy, J., dissenting). Although the dissent looked at the legislative history and concluded that Congress did not intend nonjudicial punishment to be criminal, he further concluded that nonjudicial punishment did not invoke double jeopardy protection without using the second prong of the analysis. Therefore his opinion is of little help in completing a proper analysis. *See id.* at 951.

[218] *See Ivie*, 961 P.2d at 947; *supra* text accompanying note 215.

[219] *Catlett*, 945 P.2d at 705 (citing United States v. Ursery, 518 U.S. 267, 289-90 (1996)).

[220] Notably, the court failed to cite the *Hudson* case even once.

[221] *See supra* text accompanying note 147.

proceeding that determines guilt or innocence.[222] The court concluded that nonjudicial punishment was such a proceeding.[223] To support this conclusion the court cited *Military Law in a Nutshell* for the proposition that "[t]o impose nonjudicial punishment the commander must find the accused servicemember guilty beyond a reasonable doubt."[224] Not only is this statement taken from a non-authoritative source, it is a complete misstatement of the law in this case.[225] The defendants in this case were in the Navy and hence the Navy regulations provide the appropriate guidance. As discussed in the background section above, the Navy specifically states that the burden of proof is a preponderance of the evidence.[226] Thus, one of the court's key points of analysis is based on misinformation.

Additionally, the court cites the MCM for the proposition that "after a finding of guilty the servicemember may appeal."[227] This statement is misleading in a couple of respects. First of all, there is no "finding of guilty" per se. The commander imposes punishment if he thinks the servicemember committed an offense, but there is no "finding of guilty."[228] Secondly, this statement by the court intimates that a servicemember appeals his/her guilt, but that is not the case. In fact, the paragraph cited by the court never mentions the word guilt at all.[229] It simply states that the "servicemember punished under Article 15 who considers the punishment to be

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[222] *See Ivie*, 961 P.2d at 945.
[223] *See id.* at 946.
[224] *Id.* (quoting CHARLES A. SHANOR & L. LYNN HOGUE, MILITARY LAW IN A NUTSHELL 109 (2d ed. 1996)).
[225] Arguably the reporter of the decision noted this unusual citation to a secondary source. The headnote that reports this proposition cites 10 U.S.C. § 815(b) as the authority. *See Ivie*, 961 P.2d at 941 headnote 7. As discussed elsewhere in the paper, the statute makes no mention of burden of proof. *See supra* text accompanying notes 51-52.
[226] *See* JAGMAN 0110b; *see also supra* note 52 and accompanying text.
[227] *Ivie*, 961 P.2d at 946 (citing MCM, Part V, para. 7).
[228] *See* MCM, part V, para. 4(c)(4)(B).
[229] *See* MCM, part V, para. 7.

unjust or disproportionate to the offense may appeal."[230] While the appeal authority may suspend, mitigate, remit, or set aside the punishment, there is no review of a guilty finding.[231]

Continuing, the court noted that nonjudical punishment is final because double punishment is prohibited and further because a court-martial may not be imposed if the offense was minor. Then the court stated that nonjudicial punishment is a "formalized procedure to fully and finally *adjudicate* and dispose of minor offenses in the military . . . . Thus, [it] necessarily constitutes criminal prosecution."[232] What the court misses is that it is not necessarily final, while double punishment is prohibited and a court-martial is prohibited if the offense is minor, subsequent court-martials can and do happen.[233] Furthermore, applying the court's approach to the law, the court makes no sense. Turning to *Black's Law Dictionary*, the definition for "adjudicate" is "[t]o settle in the exercise of judicially authority; to determine finally."[234] Clearly, "*nonjudicial* punishment" is not settled by judicial authority.

Finally, the court placed emphasis on the fact that any proceeding that "threatens . . . imprisonment for a criminal violation surely constitutes jeopardy."[235] The court noted that under nonjudicial punishment a servicemember may be confined on bread and water.[236] This was the court's basis for determining that nonjudicial punishment threatens imprisonment. What the court failed to recognize though is that this punishment is only authorized for those "attached to

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[230] *Id.* para. 7(a).
[231] *See id.* para. 7.
[232] *Ivie*, 961 P.2d at 946 (emphasis added).
[233] A perfect example is the case of *United States v. Gammons*, 48 M.J. 762 (C.G. Ct. Crim. App. 1998) discussed in this paper.
[234] BLACK'S LAW DICTIONARY 63 (4th ed. 1968).
[235] *Ivie*, 961 P.2d at 947.
[236] *See id.*

or embarked in a vessel."[237] Although, the sailors in this case were "attached to a vessel", this rationale ignores the fact that imprisonment is not threaten in a vast majority of situations.

In sum, the court in *Ivie* was faced with an issue of first impression and did not do very well. Even though the case featured a state supreme court interpreting its own statute, the court failed to follow its own precedent in analyzing the issue. Additionally, even in the analysis the court did utilize, it relied on faulty information. In no sense can this opinion help develop an appropriate analysis of nonjudicial punishment in a double jeopardy context.

2. *United States v. Gammons* and *United States v. Burns*

Both *Gammons* and *Burns* got closer to implementing a proper analysis and hence they have something to offer in attempting to analyze nonjudicial punishment. These cases are discussed in the paragraphs that follow.

In *Gammons*, the Chief Judge of the Coast Guard Court of Criminal Appeals was correct in concluding that the *Hudson* applies to nonjudicial punishment. The chief judge recognized that the question was not whether the proceeding was judicial, but whether the punishment equates to criminal punishment.[238] However, the chief judge only surmised in summation that nonjudicial punishment was criminal in nature.[239] The chief judge did not restate the test, nor did it look at legislative history, and it only summarily mentioned the *Kennedy* guideposts.[240] The chief judge was in the right neighborhood, but he knocked on the wrong door, thus his opinion does little to assist in the double jeopardy analysis of nonjudicial punishment.

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[237] 10 U.S.C. § 815(b) (1994); MCM, Part V, para. 5(b)(2)(A)(i).
[238] *See* United States v. Gammons, 48 M.J. 762, 763 (C.G. Ct. Crim. App. 1998).
[239] *See Gammons*, 48 M.J. at 763.
[240] *See id.*

Of the three cases, the *Burns* opinion provides the best guidance for applying the *Hudson* analysis to nonjudicial punishment. The court restated the test and applied it in a very clear step-by-step fashion.[241] The court analyzes the legislative history to determine Congress's intent was that nonjudicial punishment is not a criminal sanction and then applies some of the *Kennedy* guideposts to determine that the clearest proof does not override the legislative intent.[242] Thus, this case provides a lot of guidance for analyzing nonjudicial punishment under the double jeopardy microscope. However, the court did leave some holes in its opinion. It only analyzed four of the seven guideposts and, of those the court did analyze, some were discussed only summarily.[243] Thus, a more complete analysis is needed, it is presented in the subsection.

B. Nonjudicial Punishment Under the *Hudson* Double Jeopardy Analysis

This subsection proposes a complete double jeopardy analysis of nonjudicial punishment for use in every jurisdiction that follows the Supreme Court's analysis for what constitutes "multiple punishment" under the Double Jeopardy Clause. Hence, this analysis is intended to apply in all double jeopardy contexts in which a prosecution follows imposition of nonjudicial punishment—nonjudicial punishment-state, nonjudicial punishment-military, and nonjudicial punishment-federal civilian court.[244]

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[241] *See* United States v. Burns, 29 F. Supp.2d 318, 321-24 (E.D. Va. 1998). The court specifically noted that the *Gammons* court did not thoroughly analyze nonjudicial punishment since there was no cite other than Appellant's brief to support the finding that it was Congress's intent to make nonjudicial punishment a criminal sanction. *See Burns*, 29 F. Supp.2d at 321 (citing *Gammons*, 48 M.J. at 764).

[242] *See id.* at 321-24.

[243] *See id.* at 323.

[244] Of course in those states that do not have a statute extending double jeopardy protection to those defendants who are prosecuted by dual sovereigns, this analysis is not necessary, as the dual sovereignty principle would make double-jeopardy inapplicable. *See supra* text accompanying note 81.

As discussed earlier in the paper the Double Jeopardy Clause has been held to protect three interests,[245] the first two—subsequent prosecution following acquittal or conviction do not apply to an analysis of nonjudicial punishment.[246] Thus, if double jeopardy impacts nonjudicial punishment it is because of the third guarantee—the prohibition on multiple punishment. As mentioned in Section II.A the relevant test for analyzing whether a proceeding constitutes punishment, in the sense that it invokes double jeopardy protection, is the test reaffirmed recently by the United States Supreme Court in *United States v. Hudson*.[247]

The United States Supreme Court has stated the analysis as follows:

> Whether a particular punishment is criminal or civil is, at least initially a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label over the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."[248]

Applying the first stage of the test it is fairly clear that Congress intended nonjudicial punishment to be a civil punishment. As a general matter the statute on its face is of little help. The statute is entitled "Nonjudicial Punishment and it is part of the Uniform Code of Military Justice."[249] On one hand, one could conclude, that since it is entitled, Nonjudicial *Punishment*, then it must be a criminal punishment, but that does not follow because then the qualifier "nonjudicial' has no meaning. On the other hand, one could argue that since it is a part of the UCMJ, it must be criminal punishment, but that begs the question because the UCMJ contains a

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[245] *See supra* text accompanying notes 82.

[246] Whatever nonjudicial punishment is, it clearly is not a conviction or acquittal in the sense that those terms have been used in double jeopardy jurisprudence.

[247] 522 U.S. 93 (1997). *See supra* text accompanying notes 85-90.

[248] *Hudson*, 522 U.S. at 99 (alteration in original) (citations omitted).

variety of statutes that have nothing to do with criminal punishment.[250] Without help from the statute, the legislative history provides the necessary intent. In this instance the legislative history is clear.

As discussed in Section I, Congress first enacted the nonjudicial punishment statute as part of the UCMJ in 1950 and substantially amended it in 1962. The legislative history behind both of these enactments reflect Congress's intent that nonjudical punishment was not intended as criminal punishment. In enacting the original statute Congress stated nonjudicial punishment "is not imposed pursuant to trial by court-martial, but enables commanders to impose limited punishment for disciplinary purposes."[251] In 1962, Congress was even clearer when it stated nonjudicial punishment is a method for commanders to "deal with minor infractions without resorting to criminal law processes."[252] Furthermore, Congress stated that nonjudicial punishment "is not considered as a conviction of a crime and in this sense has no connection to the military court-martial system."[253] Finally, the Supreme Court itself has noted that nonjudicial punishment is "more akin to administrative or civil sanctions than to civil criminal ones."[254] The Court has also described nonjudicial punishment as "an administrative method of dealing with the most minor offenses."[255] It seems quite clear that nonjudicial punishment was intended to be non-criminal. As outlined above, however, the is another part to the analysis.

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[249] *See* 10 U.S.C. § 815 (1994).

[250] *See, e.g.*, 10 U.S.C. § 806 (1994) (qualification of judge advocates and legal officers); 10 U.S.C. § 836 (1994) (President delegated authority to prescribe rules of procedure for court-martial).

[251] S. REP. NO. 81-486 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2227.

[252] S. REP. NO. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2379, 2380.

[253] *Id.*

[254] Parker v. Levy, 417 U.S. 733, 751 (1974).

[255] Middendorf v. Henry, 425 U.S. 25, 31-32 (1976).

Despite clear intent, the purpose or effect of the statutory scheme may be so punitive as to transform it from a civil to criminal punishment.[256] The Court explained that when engaging in this second part of the analysis,

> the factors listed in *Kennedy v. Mendoza-Martinez*, provide useful guideposts, including: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[257]

The Court cautioned however, "that 'these factors must be considered in relations to the statute on its face,' and 'only the clearest proof' will suffice to override legislative intent and transform a civil remedy into a criminal penatly."[258] At this point this paper posits that there should be an additional consideration when considering the above factors, that is the unique military exigencies that may exist. When Congress passes any military legislation, they undoubtedly consider unique factors, otherwise there would be no UCMJ in the first place. The Supreme Court has recognized that there are unique military considerations, especially the need to maintain good order and discipline; and the Court has woven this thread throughout its analysis of military issues.[259]

Applying the factors, one can conclude that the "clearest proof" is not present to override the legislative intent. The first factor asks "whether the sanction involves an affirmative disability or

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[256] *See Hudson*, 522 U.S. at 99.

[257] *Hudson*, 522 U.S. at 99-100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

[258] *Id.* at 100 (quoting *Kennedy*, 372 U.S. at 169).

[259] *See* Chappell v. Wallace, 462 U.S. 296, 300-05 (1983) (need for military discipline makes 42 U.S.C. § 1983 action against superior officers improper); Middendorf v. Henry, 425 U.S. 25, 45-47 (1976) (military factors help justify the denial of counsel to defendants facing summary court-martial); Parker v. Levy, 417 U.S. 733, 744, 756 (1974) (military factors mandate a different analysis for vagueness challenge to articles of the UCMJ).

restraint."[260] In applying this factor the Court has stated that it is not an affirmative disability or restraint if the punishment does not approach the "infamous punishment of imprisonment."[261] In applying this factor to nonjudicial punishment, the *Burns* court held that the punishment imposed in that case was nothing approaching this infamous punishment.[262] Additionally, the *Burns* court noted that this punishment was more like the punishment of an employer rather than the Government invoking its power to imprison.[263] The *Burns* court did not complete the analysis, because it only applied the factor to the punishment received in that case. The question should be whether the punishment that can be received imposes an affirmative disability or restraint. Certainly the punishment of confinement on bread and water or diminished rations is an affirmative disability. Additionally, there are punishments which include arrest in quarters (officers only) and correctional custody.[264] These punishments might also be considered affirmative disability or restraints, but they most certainly do not approach imprisonment.[265] It is conceivably easier to suggest that confinement approaches the infamous punishment of imprisonment, but it can only be imposed for three days and it can only be imposed on those attached to or embarked in a vessel. This limitation suggests that Congress was aware of a unique reason to authorize such a "nonjudicial" punishment.[266] Although this punishment arguably threatens the infamous punishment of imprisonment, it does so in only a limited fashion

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[260] *Hudson*, 522 U.S. at 99 (citations omitted).

[261] *Hudson*, 522 U.S. at 104 (quoting Flemming v. Nestor, 363 U.S.. 603, 617 (1960)) (internal quotes omitted).

[262] *See Burns*, 29 F. Supp.2d at 323. The defendant's punishment under Article 15 was restriction and certain extra duties. *See id.*

[263] *See id.*

[264] *See supra* text accompanying notes 54-55.

[265] Arrest in quarters could hardly be imagined as imprisonment, especially this day in age when you could get just about anything you need through the internet or by phone. Similarly, correctional custody really does not constitute imprisonment, it is designed to be used as counseling to improve behavior. It is not confinement. *See* 10 U.S.C. § 972 (1994); United States v. Shamel, 22 C.M.A. 361, 47 C.M.R. 116 (C.M.A. 1973).

that is justifiable for unique military reasons, thus this factor probably does not support a conclusion that nonjudicial punishment was intended to be criminal.

The second factor asks "whether [nonjudicial] punishment has historically been regarded as punishment."[267] Without argument nonjudicial punishment is by its terms punishment. But it is not intended as criminal punishment. The *Burns* court recognized this.[268] The proceeding is a disciplinary proceeding designed to avoid the criminal justice system and thus is not punishment in the sense that criminally convicts. Furthermore, the military uses it to maintain an effective fighting force without being slowed down with courts-martial. Assuming it is punishment under this factor, one factor alone does not transform civil remedy into a criminal punishment.

The third factor asks "whether [nonjudicial punishment] comes into play only upon a finding of scienter."[269] Clearly, there is no requirement of scienter for the imposition of nonjudicial punishment. The commanding officer simply decides whether the servicemember committed an offense.[270] Hence, this factor indicates that nonjudicial punishment is civil in nature.

The fourth factor asks "whether [nonjudicial punishment] will promote the traditional aims of punishment—retribution and deterrence."[271] Although nonjudicial punishment will likely deter others from emulating the offender's conduct, its purpose is much broader than that. It allows the military commander to discipline without having to lose resources to a court-martial. The

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[266] *See* S. REP. NO. 81-486 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2234. The Navy proposal was to allow such confinement for seven days and there was no vessel exception, the House added both these requirements. Congress recognized a need for it at sea, but could not justify it ashore. *See id.*

[267] *Hudson*, 522 U.S. at 99.

[268] *See Burns*, 29 F. Supp.2d at 323.

[269] *Hudson*, 522 U.S. at 99.

[270] *See* MCM, Part V, para. 4(c)(4)(A). The *Burns* court reached the same conclusion. *See Burns*, 29 F. Supp.2d at 323.

[271] *Hudson*, 522 U.S. at 99.

Burns court noted as much.[272] Additionally, the Supreme Court has noted that "the mere presence of [a deterrent] purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'"[273] Indeed the need for discipline is one such civil goal.

The fifth factor asks "whether the behavior to which [nonjudicial punishment] applies is already a crime."[274] Clearly, the behavior to which nonjudicial punishment applies is already a crime. The MCM provides that nonjudicial punishment may be imposed for minor offenses under the punitive articles of the UCMJ.[275] But this fact alone does not make nonjudicial punishment criminal in nature, especially when we compare crime between jurisdictions. The Supreme Court has recognized that the UCMJ criminalizes a much broader range of conduct than does a civilian criminal code.[276] Thus, the behavior may only be criminal because it needs to be to help maintain military discipline. This factor then really does not assist the analysis. A conclusion that nonjudicial punishment is criminal punishment because it punishes conduct that is "criminal" under the UCMJ really begs the question. Many times the offense under the UCMJ is there simply because it helps to maintain a disciplined effective fighting force, not because it is a crime that needs to be punished.[277].

The sixth factor asks "whether an alternative purpose to which [nonjudicial punishment] may rationally be connected is assignable for it."[278] An alternative purpose to punishment can easily, and by all means rationally be assigned to nonjudicial punishment rather than a punitive purpose. The MCM states that the purpose of nonjudicial punishment is to "provide[] commanders with

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[272] *See Burns*, 29 F. Supp.2d at 323.
[273] *Hudson*, 522 U.S. at 105 (quoting United States v. Ursery, 518 U.S. 267, 292 (1996)).
[274] *Hudson*, 522 U.S. at 99. This factor and the remaining two factors were not addressed by the *Burns* court.
[275] *See* MCM, Part V, para. 1(e).
[276] *See* Parker v. Levy, 417 U.S. 733, 749 (1974).
[277] Absent without leave or sleeping on duty offenses come to mind. *See* 10 U.S.C. §§ 886, 913 (1994); MCM, Part IV, para. 10, 38.

an essential and prompt means of maintaining good order and discipline and also promotes behavior changes in servicemembers without the stigma of a court-martial conviction."[279] Hence, this factor quite clearly indicates a scheme with a non-punitive nature.

The final factor asks "whether [nonjudicial punishment] appears excessive in relation to the alternative purpose assigned."[280] If we accept that nonjudicial punishment serves the alternative purpose of maintaining good order and discipline, then the question is whether nonjudicial punishment is too excessive in relation to this purpose. Clearly, it is not, as Congress has stated this punishment is "limited punishment for disciplinary purposes."[281] Congress has provided a limited authority to impose nonjudicial punishment, this determination is entitled to deference especially in the military context.[282] Therefore, this factor supports a conclusion that nonjudicial punishment is noncriminal.

Despite the fact that some of the factors above may indicate that nonjudicial punishment is a criminal punishment, those factors in no way show the "clearest proof" to override the legislative intent and turn this civil sanction into a criminal punishment. This is further supported when the military system is given some deference and unique military factors, especially the need to maintain good order and discipline, are considered. In this light, nonjudicial punishment is most likely a civil sanction and not entitled to protection under the Double Jeopardy Clause.

This analysis should apply to any jurisdiction that applies Supreme Court Double Jeopardy jurisprudence to its laws. For example, the Washington Supreme Court should have reached this conclusion in the *Ivie* case. That court's own holdings had adopted the *Hudson* test, but for

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[278] *Hudson*, 522 U.S. at 99.
[279] MCM, part V, para. 1(c).
[280] *Hudson*, 522 U.S. at 99-100.
[281] S. REP. NO. 81-486 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2227.

whatever reason they failed to apply it. Unfortunately this could have some negative consequences, as is discussed in the next section.

V. Impact and Recommendations

A. Potential Impact of *Ivie* Holding

The previous section outlined analysis of nonjudicial punishment under double jeopardy jurisprudence as espoused by the United States Supreme Court. This analysis should be applied by any and all jurisdictions that follow Supreme Court precedent for double jeopardy principles.

The Washington Supreme Court's current case law indicated that they applied this analysis to double jeopardy cases, but in the *Ivie* case they did not. They relied on secondary sources and inaccurate information. The problem with this decision is that it could have a potential problematic impact on the twenty-eight other states who have extended double jeopardy protection despite dual sovereignty. This is the only state decision that attempts to analyze nonjudicial punishment under double jeopardy law and thus it is quite possible it could be cited with approval, despite the fact that the analysis is wrong.[283]

These situations are more likely to present themselves in the years to come. The reason for this is that there is a higher percentage of the armed forces stationed in the United States, as opposed to fix locations throughout the world. Thus, the chances for trouble in local municipalities will increase. Arguably, states will want to maintain order and enforce laws, which may necessitate prosecutions for minor offenses. Similarly, the military wants to maintain good order and discipline, which will most likely necessitate the use of nonjudicial punishment.

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[282] *See Parker*, 417 U.S. at 756 (Congress permitted to legislate broadly and with greater flexibility with regard to military affairs).

[283] Of course if a state interprets its own statute without regard to the Supreme Court analysis, that state should be free to analyze as they always have as long as they do so with the proper information.

These are different processes that serve different interests and thus each sovereign should be allowed to protect its own interests. Of course a sovereign may think it has a greater interest in protecting the defendant's rights and thus would like to extend double jeopardy protection in a nonjudicial punishment situation. This is quite certainly a legitimate interest, but the protection should not be given at the expense of the law as it was in *Ivie*.

B. Recommendations

Those states that would like to preclude a trial following nonjudicial punishment should amend their former jeopardy statutes to state precisely this. If a state does not do this and that state happens to follow Supreme Court jurisprudence with regard to Double Jeopardy, then that state should have no choice but to hold that nonjudicial punishment is not a bar to state prosecution.[284]

Additionally, local municipalities and military officials should reach a formal understanding as to how they will prosecute off base offenses. This will ensure that the interests of both sovereigns are fulfilled. It is probably the case that many local municipalities would prefer that the military punish its own, that way it allows the local authorities to utilize their resources to prosecute more serious crime. If interests and procedures are adequately communicated any double jeopardy issues can be avoided in the first instance.

CONCLUSION

The Washington Supreme Court was on to something in *Ivie*. There is definitely a need to clarify the interrelationship between nonjudicial punishment and double jeopardy. The *Burns* court got closer, but there were still gaps in its analysis. This paper proposed the proper analysis

for nonjudicial punishment under double jeopardy jurisprudence and concluded that nonjudicial punishment is not punishment under the double jeopardy rubric. The paper notes that those states that follow Supreme Court jurisprudence in this regard should ignore the *Ivie* decision and not disqualify a state court trial on the basis of prior nonjudicial punishment. Of course states that do not follow the Supreme Court analysis should apply their own law, but in no case should they rely on *Ivie*. Furthermore, those states, that follow the Supreme Court analysis and wish to extend double jeopardy protection to people who have received nonjudicial punishment, should modify their statutes if the wish to further protection.

The fact of the matter is that today's military has an ever increasing presence within the borders of the United States. Up until the early 1990s the United State military was spread all around the world as a permanent presence in many foreign locations. However, today that is not the case. Although its true that the military is spread throughout the world, the presence is no longer permanent. The military is based in locations in the United States and deploys its troops around the world, rather than permanently stationing them there. The result is more troops interacting with local communities throughout the United States. Clearly, the military and these communities need to be able to operate harmoniously. A clear understanding of what role nonjudicial punishment plays in a double jeopardy context will add to that harmony.

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[284] As was seen in Section II.B some states had double jeopardy statutes that would not apply to this situation for any military proceeding because the specifically only included former prosecutions by a federal District Court. *See supra* text accompanying note 93.